BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit appears at page 168 in the record and is reported in — F. (2d) —.

II.

Statement of Grounds of Jurisdiction.

This Court has jurisdiction under Section 347 of Title 28, U. S. C. A.

III.

Statement of the Case.

The case is stated in the preceding petition and said petition is incorporated by reference herein.

IV.

Specification of Errors.

The learned United States Circuit Court of Appeals for the Tenth Circuit erred in failing to reverse the Trial Court (United States District Court for the District of New Mexico) on each of the following assigned errors:

(1) That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

(2) That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

(3) That the trial Court erred in refusing petitioners' request, *in limine*, to apply the "Rule" with respect to the separation of witnesses.

V.

Argument.

(1) The learned Circuit Court erred in failing to reverse on petitioners' first assignment of error.

> That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

The Circuit Court agreed with petitioners' contention.

> "Variance is fatal where indictment charges one large conspiracy and proof shows two different and disconnected smaller conspiracies, provided defendants substantial rights have been prejudiced."
>
> *Berger* v. *U. S.* (U. S. 1935), 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (rev. C. C. A. 1934), 73 F. (2d) 278.

But the Circuit Court is in error, it is submitted, in its analysis of the facts.

It is stated on page 8 of the opinion below (R. 175):

> "The proof in this cause, however, conclusively shows that all the defendants had a similar general purpose in view—the sale of oil and gas leases on New Mexico lands to the public generally. *Each of the defendants was cooperating in privity with the others toward the same common end.*"

We strenuously assert that there is not one word of testimony in the record upon which the italicized words can rightfully be based. Granting the verity of the first sentence above quoted, we maintain, even though the proof showed a similar general purpose, that is, the sale of New Mexico oil leases to the public generally, that there is no proof in the record showing that each of the defendants was cooperating *in privity* with the others toward the same common end.

To the contrary, the evidence, and all the evidence when taken as a whole, is susceptible of but one conclusion, which is that there was absolutely no privity between the several defendants on trial and there was not one general conspiracy between the defendants on trial and not on trial, but a multitude of smaller, different and disconnected ones, wholly apart and separate and distinct from the others, and without relation each to the other.

Counsel for petitioners would further show the Court that the Record discloses that the defendants were in competition with each other rather than in privity—that they were competitors, not conspirators.

Counsel for petitioners have carefully reviewed this evidence in their motion for rehearing before the Circuit Court (R. 182 to 189, inclusive) and incorporate the same, by reference, in this brief.

(2) The learned Circuit Court erred in failing to reverse on petitioners' second assignment of error:

> That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

It is submitted that the opinion of the Circuit Court is inaccurate wherein the following statement is made on page 10 of the opinion (R. 177):

> "The instructions *having adequately and correctly covered the applicable law and the facts,* it was not error for the Court to refuse to give requested instructions covered by those given."

We insist, as was insisted in the Court below, that the instructions as given by the trial Judge did not present, to the Jury for its determination, appellants' theory of this phase of the case, in that the Court's general charge did not submit to the Jury the issue as to whether there was one general conspiracy or a series of unrelated and distinct con-

spiracies, which issue would have been fairly submitted had the Court granted the special instructions asked for by the appellants.

We most earnestly urge, that, upon our theory of the law applicable to the facts in this record, the motion for a directed verdict at the conclusion of the Government's case should have been sustained. If, however, the Court does not agree with our contention in this regard, certainly, the law being as declared in the opinion of the Court, there existed a question of fact as to whether or not the proof showed one general conspiracy or a series of individual conspiracies, and in such event, the Trial Court should certainly have given the special instructions as requested, having failed absolutely to present this question of fact to the Jury in its main charge. We earnestly request that the Court carefully examine the Court's general charge, a close perusal of which, we are sure, will convince the Court that our theory of the case was not in anywise presented.

The Court has said in the case of *Little* v. *United States*, C. C. A. 10, 73 F. (2d) 861, that a defendant is entitled to have his theory of the case clearly presented to the Jury. Such being the law, the special instructions should have been submitted.

(3) The learned Circuit Court erred in failing to reverse on petitioners' third assignment of error:

> That the trial Court erred in refusing petitioners' request, in limine, to apply the "Rule" with respect to the separation of witnesses.

The Circuit Court, in its opinion, page 10 and page 11 (R. 177), it is admitted, correctly stated the law in stating:

> "the exclusion of witnesses from the court room while not testifying, is addressed to the trial court's sound discretion."

Nevertheless, it is submitted that sound judicial discretion should not permit the court room to be constantly

packed with one hundred (100) witnesses—their relatives and friends—if the object is to accord defendants a fair and impartial trial.

At the beginning of this trial, we are informed (counsel on this brief not having represented petitioners in the trial Court below) that upwards of one hundred witnesses were called and sworn in by the Government. The record on appeal discloses that some forty or more witnesses actually testified on the trial of this case. Of course, we understand that it is within the discretion of the Court whether or not it will exclude witnesses from the court room during the trial, but we cannot understand, when requested, why the trial court would refuse to invoke the "rule".

Counsel for petitioners represented another defendant at the same term of court, charged with a somewhat similar offense, and we are aware that all of the witnesses who testified in this case were at all times present in the court room —talking among themselves, both in the corridors and in the court room, discussing the testimony of the various witnesses who had testified and who were to testify, among themselves and with the lawyers and other spectators generally—at all times, in the presence of the jury evincing an extreme personal interest in seeing that the defendants on trial were convicted. We contend that the testimony of the witnesses in this case was, of necessity, though perhaps unconsciously, colored as is disclosed by the striking similarity as is reflected in the record. We further contend, that according to the very nature of things and the human equations that obtain, the jury must have been influenced by the intense feeling that permeated the atmosphere of the Court room. To properly present to this Honorable Court the picture in the court below, a moving and talking picture of the proceedings in the Court below would be required. If such a picture could be unfolded before you, we feel sure that you would be able to observe the delight on the faces

of the spectator witnesses, not then testifying, when the prosecution seemingly scored a point or received a favorable ruling at the hand of the Court. Likewise, one could see the sneers and leers that were directed against the defendants and their respective counsel.

We therefore, earnestly request, in order that justice be done and that there might be no question as to the fair and impartial trial that is guaranteed under our Constitution to a defendant whose liberty is at stake, that this Honorable Court hold that to deny to a defendant, under circumstances such as in this case, the right to have the witnesses put under the rule, is an abuse of the Trial Court's discretion allowed him in such matters.

VI.

Conclusion.

Petitioners earnestly maintain that a consideration of the entire record and the errors complained of, conclusively show that petitioners did not receive the fair and impartial trial that is guaranteed to them under the Constitution and Laws of the United States.

WHEREFORE Petitioners pray that this Court grant the writs of certiorari and speak in its supervisory capacity to the end that fair trials may be had.

Respectfully submitted,

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